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THE EMPLOYMENT STATUS OF OHIO'S MIGRANT WORK FORCE

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Once again, the status of Ohio's migrant work force has been called into question by the Internal Revenue Service. At issue is whether the grower must withhold FICA taxes from the workers wage.

If the migrant worker is classified as an employee then the grower is required by federal law to withhold a percentage of the employees wage plus contribute an additional 7% excise tax to the social security system. However, the grower is not required to withhold the FICA tax nor contribute the additional excise tax on payments to individuals classified as either sharefarmers or crew leaders.

The leading authority in this area is a 1976 Federal District Court decision establishing that pickle pickers are independent contractors (share farmers) and that growers need not withhold FICA taxes from their wages. [1] The court held that migrant workers who did not participate in planting but assumed responsibility for ensuring that the crop was properly cultivated and who were to receive one-half of the sales proceeds as compensation were share farmers and not employees. Therefore, the court ruled that payments to the pickers were exempt from the FICA and excise tax requirements.

In order to be viewed as a share farmer three requirements, as set out in I.R.C. Sec 3121(b)(16), must be met. First, the individual must undertake to produce agricultural commodities. Second, these commodities must be divided between the picker and

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[1] Sachs v. United States, 422 F.Supp. 1092 (N.D.Ohio 1976)

the grower. Third, the picker's share must depend on the amount of the commodity produced.

It is the first of these three requirements that is being questioned by the Internal Revenue Service. Revenue Ruling 85-85, issued in 1985, states that in order to meet this requirement of "undertaking to produce", the share farmer must participate in the initial planning of the operation and must incur out of pocket expenses.

The I.R.S. disagrees with the ruling in Sachs claiming the court's focus on risk-sharing was misplaced. This position is substantially similar to the I.R.S.'s argument in the Sachs case. Their contention was that the share farmer had to have the responsibility of caring for the crop from planting to harvesting. However, the Service was unable to present any authority for its position and the court rejected the argument outright.

The Service concludes revenue ruling 85-85 by saying it will not follow the Sachs ruling as it pertains to exemptions for share farmers. Farmers in Ohio have come to rely on the decision in Sachs as authority for viewing their migrant labor force as independent contractors. With the publication of Revenue Ruling 85-85, these farmers can no longer be sure that they are safe in this course of action. The Service may very well come to northwest Ohio to test the strength of Sachs as authority on this issue.

It is unlikely the District Court will reverse itself on this issue if faced with the question again today when the Service is expressing basically the same argument it did in 1976. If the district court does follow it's prior decision, the I.R.S. would likely appeal that decision to a higher court. Clearly, no one wants to be the one who will be taken to court to test the various theories.

Prior to the ruling in Sachs, many growers in Northwest Ohio withheld the amount of FICA tax required from the share farmers wage and held it in an escrow account. If three years expired after the date of filing of the growers tax return and the I.R.S. had not instituted an action to compel payment, the money in the escrow account would be refunded to the pickers. After Sachs, this practice was abandoned with confidence that the pickers were indeed share farmers exempted from the FICA tax.

With the publication of Revenue Ruling 85-85, this security has vanished.

It might be advisable for the grower who does not wish to risk becoming the Service's test case to reactivate the escrow account system. For example, if the court should reverse itself on this issue two years from now and the farmer did not hold the FICA tax in escrow, the entire amount of the deficiency

would have to be paid from the pocket of the grower. If an escrow account had been maintained, the deficiency would be paid from this fund. The escrow account would be made up of the portion of the employment tax (7%) withheld from the picker's wages. If the service does not pursue the matter or the court sustains the holding in Sachs, then the amount held in escrow would be returned, with interest, to the pickers.

Another method by which the grower might protect against this risk is to enter into a contract with the crew leaders establishing their status as independent contractors. Within this contract should be a clause providing for a contribution from the picker should the court reverse its position on this issue. If the Service assesses a deficiency and it is sustained by the court, the contract should compel the crew leader to file an amended return seeking a refund for the amount of FICA tax withheld from his "employees." This amount, or a portion thereof, should then be forwarded to the grower to help in paying the assessed deficiency. Of course, finding all the concerned parties after the issue has been resolved will be extremely difficult.

Clearly the escrow account is the safest method by which a grower can protect against loss from a reversal in position on this issue. Again, it is unlikely that the District Court will reverse its position on this issue, but no one can be sure of this. There is also the possibility that a higher court will overrule Sachs. The choice at this point is with the grower.

Whether or not Revenue Ruling 85-85 will have the effect of overruling the Sachs case is unclear, but it does create grounds for concern among Ohio's growers who employ migrants on a share farming basis.